Remarks

This communication is responsive to the Office Action of December 14, 2007. Reexamination and reconsideration of claims 1, 5-7, 11-13, 17-21, and 25-30 is respectfully requested.

Summary of The Office Action

Claims 1, 7, 13, 19, 29 and 30 were rejected under 35 U.S.C. §103(a) as being unpatentable over Claessens et al. (US Patent 7,222,255 B1)(Claessens) in view of Zerlan (US Patent 7,010,295 B1)(Zerlan).

Claims 5, 6, 11, 12, 17, 18, 20, 21, and 25-28 were rejected under 35 U.S.C. §103(a) as being unpatentable over Claessens and Zerlan in view of Beverly (US Patent 6,732,182 B1)(Beverly).

The Claims Patentably Distinguish Over the References of Record

35 U.S.C. §103

To establish a prima facie case of 35 U.S.C. §103 obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. MPEP 2143.01 Second, there must be a reasonable expectation of success. MPEP 2143.02 Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP 2143.03 Additionally, the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). This requirement is intended to prevent unacceptable "hindsight reconstruction" where Applicant's invention is recreated from references using the Application as a blueprint.

Here, the third criteria described in MPEP 2143.03 is not satisfied since none of the references, alone and/or in combination, teach or suggest all the claim limitations. None of the references, alone and/or in combination, teach establishing a peak performance rate as the highest rate with no packet dropout. Thus, none of the claims are obvious for at least this reason.

All the independent claims 1, 7, 13, and 19 include the same element, "establishing a peak performance rate as the highest rate with no packet dropout". None of the references describe this limitation.

Claessens describes a system and method for network performance testing. However, nowhere does Claessens describe the claimed "establishing a peak performance rate as the highest rate with no packet dropout". The Office Action asserts that Claessens teaches the establishing at Col. 2, lines 47-62. However,

this passage is silent concerning the claimed establishing. Line by line analysis of the passage yields no teaching of the claimed establishing.

Sentence	Teaches "establishing"?
Some network applications may be less tolerant to traffic delays or losses than others.	No.
If infinite network resources were available, all application traffic could be carried at the application's required rate with no packet loss.	No.
However, network resources are not infinite, and test performance systems for testing network equipment are necessary to optimize the network capacity.	No.
Testing of network devices is typically based on a throughput, or the ability to forward packets of various sizes between input (ingress) ports and output (egress) ports, measured in packets per second ("pps") with measurable delay (latency) and delay variability (jitter).	No.
Typically, the biggest challenge experienced during testing of network devices is the ability to generate enough traffic to determine a point where a device under test starts to drop packets and reaches a saturation point.	No.

Clearly no part of the cited passage teaches the claimed establishing. Careful review of the entire reference yields the same failing. Claessens does teach generating a test performance record that can be used by a control network

device to determine "latency, throughput, or delays associated with each transmission path." Col. 16, lines 5-7. None of these teach the claimed establishing. Thus, none of the independent claims are made obvious by Claessens.
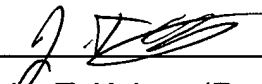
Zerlan describes a method for automatic testing of network elements. Although the Office Action does not even assert that Zerlan teaches the claimed establishing, careful review of the reference was undertaken and, like Claessens, revealed no teaching of the claimed establishing. Thus, none of the independent claims are made obvious by Zerlan or the combination of Claessens and Zerlan.

Beverly describes a method for generating a packet loss report. Once again, the Office Action does not even assert that Beverly teaches the claimed establishing. However, careful review of the reference was undertaken and, like both Claessens and Zerlan, no teaching of the claimed establishing was discovered. Beverly describes, in at least Col. 5, lines 45-50, that "real-time summaries typically consist of 'flows-based' statistics, which detail characteristics of the traffic in terms of protocol distribution, byte volumes, packet volumes, packet sizes, etc." The type of report provided by Beverly describes "which packets were lost and which were out of sequence." Col. 10, lines 41-42. While useful information, none of these teach the claimed "establishing". Thus, none of the independent claims are made obvious by Beverly, or the combination of Beverly, Claessens, and Zerlan. Accordingly, none of the dependent claims are made obvious by any of the references.

Conclusion

For the reasons set forth above, claims 1, 5-7, 11-13, 17-21, and 25-30 are now in condition for allowance. An early allowance of the claims is earnestly solicited.

Respectfully submitted,

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